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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73

ALLENBERG COTTON COMPANY, INC.,
Petitioner,

v.

BEN E. PITTMAN,
Respondent.

On Appeal from the
Supreme Court of Mississippi

BRIEF FOR THE AMERICAN COTTON SHIPPERS ASSOCIATION AS AMICUS CURIAE

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AUTHORITY TO FILE

This brief amicus in support of the position of the petitioners is filed by the American Cotton Shippers Association with the consent of the parties as provided for in Rule 42(2) of the Rules of this Court.

INTEREST OF THE AMERICAN COTTON SHIPPERS ASSOCIATION

The American Cotton Shippers Association is a trade association of cotton merchants, shippers and exporters of raw cotton.[1] The association was founded in 1924 and is incorporated under the laws of the state of Tennessee. The association is authorized to cooperate and treat with Cotton Exchanges, Cotton Shippers Associations, Cotton

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1 A. B. Cox, Cotton - Demand, Supply, Merchandising (Hemphill's, Austin, Texas 1953), pp. 202-205.

... The over-all central organization in the cotton merchandising system for United States grown cotton is the American Cotton Shippers Association, incorporated under the laws of Tennessee on June 8, 1924.

Functions and activities of the American Cotton Shippers Association extend into many fields. It can best be described as an organization devoted to solution of problems of the cotton trade and industry. It performs its services through the establishment of equitable rules and trading relations with cotton manufacturers in spinners' markets in promoting equitable rules and procedures for buying cotton in local markets and in negotiating with foreign markets for American cotton in such matters as standardization of trade practices, adoption of suitable rules and trading procedure, and of settling disputes.

This association represents the cotton trade in matters of public relations. It has as one of its functions the expansion of markets for American cotton by removing difficulties in the way of the sale of American cotton such as now exist in most countries of the world. Sometimes it is a matter of finance which involves working out sound principles of financing sales with funds of the Export-Import Bank in the United States. Sometimes it involves determining with banks or governments abroad the amount of risks the merchants themselves must carry. In short, the American Cotton Shippers Association is preeminently the spokesman, the negotiator, of the American cotton trade in merchandising of American raw cotton not only in this country but throughout the world.

The Association negotiates trading rules with manufacturers to govern trading and settlement of disputes in spinners' or manufacturers' markets to which it jointly subscribes. It is the agency which represents the United States cotton trade in establishing trading relations in foreign markets. This Association represents the spot cotton trade in suggesting rules and trade practices in futures markets. It is the official spokesman for the spot cotton trade before various government agencies and departments. It helps to standardize trade practices among the Association's federated members insofar as practicable.

Buyers Associations, Cotton Manufacturer Associations, Compresses, Gins and individuals in the United States and in any foreign country in evolving rules, regulations, and practices governing the cotton trade which shall be fair to all concerned; and is authorized to engage in all such activities in connection with the cotton industry as come within the province of a trade association [Articles of Incorporation. Art. 2] including the right to sue and be sued by the corporate name [Art. 3].

The 492 members of the association derive their status through membership in one of five federated associations,[2] such associations doing business in sixteen states throughout the cotton belt:

Arkansas-Missouri Cotton Trade Association
Atlantic Cotton Association
Southern Cotton Association
Texas Cotton Association
Western Cotton Shippers Association

Of the total U. S. cotton crop the member firms handle over 70% of the raw cotton sold to domestic textile mills and export 80% of the U.S. crop sold in foreign markets.

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2 ARTICLE 8.

"That this Association shall be a Federation of Cotton Shippers' Associations and any Association of cotton shippers in the United States shall be eligible to membership; each member of each cotton shippers' association belonging to the American Cotton Shippers Association shall be deemed a member of the American Cotton Shippers Association, unless otherwise provided in the disciplinary By-Laws of this Association, except that no individual firm or corporation engaged in buying and selling cotton shall be entitled to membership in the American Cotton Shippers Association except through membership in, or the express approval of, the federated member association within whose jurisdiction is located the principal office of such shipper, or in the case of affiliated cotton shippers the principal office of the controlling affiliate, . . ."

Four cooperative marketing associations and textile mill buyers control the remaining portions of these markets.[3]

Cotton merchants have a bifurcated function of buying and selling cotton. The merchants purchase and assemble millions (approximately 13 million in 1973) of individual bales of cotton offered for sale by approximately three-hundred thousand farmers producing cotton in sixteen states across the cotton belt. Over 18 varieties of U.S. cotton are produced in several hundred combinations of quality and staple lengths (due to the various types of seed, soil, weather conditions, and harvesting practices). The merchant classes each bale according to the quality factors and assembles the cotton of the same grade, staple length, color and character into even-running lots in warehouses at various locations in the different states. Cotton is sold to textile mills in spinners' markets in even-running lots at various times and delivery is made to locations designated by the various textile mills. The merchant also performs the function of storing and concentrating cotton and the financing of surplus spot cotton including the excess ginnings over consumption during the major harvest months.[4]

The commercial function of the cotton merchant, the involvement of members of this association, in the purchase and sale of cotton directly involves them to a substantial degree in the transacting of business in interstate commerce. The ruling of the Supreme Court of Mississippi

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[3] Hearings before the Subcommittee on Agricultural Exports of the Committee on Agriculture and Forestry, United States Senate, Ninety-Second Congress (First Session) on "The Situation Regarding Agricultural Exports In Light Of The Current Labor-Management Dispute In The Shipping Industry", November 5, 1971, at p. 80.

[4] In years of excessively high carryovers the Commodity Credit Corporation performs the storage and sale function for cotton taken over by the U.S. Government on loans forfeited by individual cotton producers.

directly affects the continued orderly transacting of the business of the members of this association; and that decision was decided in a way not in accord with the applicable decisions of this Court. In light of these considerations, the interest of the American Cotton Shippers Association is manifest.

ARGUMENT

The facts giving rise to this litigation are succinctly reviewed in the Brief of Allenberg Cotton Company, the appellant, and reference is made here only to the effect that the manner of doing business therein is typical of industry practices. There is, in fact, nothing about the transaction out of the ordinary. Its significance lies in the fact that, should this transaction be made unenforceable by reason of the law made in this case, the industry itself stands upon quicksand, in danger of being brought to rest by an interpretation of law inconsistent with business practice.

The importance of the question here presented cannot be urged too strongly. Cotton is the nation's fourth leading crop worth more than $2.2 billion annually in income at the farm level, and more than $12.2 billion at the retail level. In 1971, 5.1 billion pounds of cotton was sold in the United States. In the same year, consumption of cotton equalled 19 pounds per capita within the United States, while $584 million dollars worth of cotton was being exported. More than 5.5 million persons live wholly or in part upon incomes derived directly from cotton, and another 12.8 million depend for their livelihood upon jobs related to cotton processing and manufacturing.[5]

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[5] COTTON TODAY, a publication of the National Cotton Council of America.

Allenberg Cotton Company had entered into a contract to purchase all of the cotton produced on the Ben C. Pittman farm, a practice which is a relatively recent innovation, sometimes called "forward contracting." This practice has led to an expansion of cotton planting with the manifold benefits to everyone, by permitting the farmer to know that he can produce at a profit and assuring the merchant of a supply to meet commitments at a known price. The farmer incurs no added risk by virtue of such a contract. In fact, he eliminates from that point on any risk to him of subsequent drops in the market price. In addition, his contract is worth money to him at his local bank, where it provides collateral for financing his farming operations. The significance of the practice was recently stressed by the Department of Agriculture:

> WASHINGTON, Sept. 7 . . . Citing increased use of forward contracting in cotton marketing, a top administration farm official today called on farmers and buyers "to preserve the marketing relationship they have been building in order to strengthen this marketing technique for the crop years ahead."
>
> Kenneth E. Frick, Administrator of the U. S. Department of Agriculture's Agricultural Stabilization and Conservation Service, said "This marketing tool has become increasingly popular among farmers and buyers since the 1970 crop season when 11% of the upland cotton crop was sold ahead. A recent USDA survey shows that 45% of the 1973 crop acreage was contracted ahead up from 32% for the previous crop. Forward contracting can be very important in marketing the 1974 cotton crop and future crops before they are planted.
>
> "Forward contracting can be an essential tool in turning the corner away from Commodity Credit Corporation

ownership of commodities and to Treasury payments," Mr. Frick said. "I hope farmers and processers can build a new demand chain concept in agricultural marketing to replace the forty year old production curtailment philosophy and the entrenched dependence by processers on the U. S. government to carry reserve backstop inventories of farm products.

"With the August 10 signing by President Nixon of the Agriculture and Consumer Protection Act of 1973, and Secretary Butz' subsequent early announcements of the basis provisions of all the major commodity programs for the spring of 1974, U. S. farmers already have the crop production rules for the year ahead," Mr. Frick said. "Farmers are now in a position to plan ahead and they are ready to produce for the marketplace. But the farmer must receive his signals from the market—from the domestic processer, from the trader and the foreign buyer—in order to complete his plans.

"Lines between the producer and buyer should taut and smooth enough that a demand pool will result in a production increase to meet consumer needs," Mr. Frick said.

"During the last forty years of restrictive agriculture, stocks of wheat, feed grain and cotton have been acquired and held year after year at taxpayers' expense in Commodity Credit Corporation (CCC) storage bins. The government has been performing an inventory function for the trade and has been serving as a market for farmers for more than a generation. Today's generation of processers and farmers is accustomed to utilizing CCC, and I expect that some of them will have real difficulty in adjusting to the new environment," Mr. Frick said.

"These are days not to be caught in our habits," Mr. Frick concluded. "These are days to look forward to marketing systems that suit the needs of the farmer. This is the time for farmers to work harder than ever before to move into the markets of the world and then hold on to the gains they have made."[6]

The practice is also urged by the National Cotton Council of America which explained the importance of forward crop contracting as follows:

> Yet without a contract, what incentives does the farmer have to plant cotton, and what can he offer his source of production credit as assurance that his loan will be repaid? His government payment? Yes, but that covers only the effective allotment—less than 9 million acres in 1973 and not nearly enough to supply a normal market.
>
> What beside a crop contract can secure the financing of those needed acres beyond the allotment? The loan? The present loan level of about 20-1/2 cents for SLM 1-1/16", which is about the average of the crop, won't even cover out-of-pocket costs—much less total costs—for over half the nation's production. The most recent USDA cost survey showed only 45.8 percent of the crop produced at a 'direct' cost of less than 21 cents, and only 16.8 percent at a total cost of less than 21 cents.[7]

In the instant case, however, the Mississippi Supreme Court, by an exceedingly restrictive ruling, has claimed

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6 USDA News Release No. 2771-73; See also USDA News Release No. 2956-73.

7 Dabney S. Wellford, **The Economic Outlook for U. S. Cotton**, report before the Thirty-Fifth Annual Meeting of the NATIONAL COTTON COUNCIL OF AMERICA, January 29, 1973.

for the local State the privilege to govern by its laws this normal conduct of cotton crop contracting which this Brief submits is an activity of interstate commerce. Such impairment of contracts carried on in interstate commerce is highly significant and potentially very damaging to the cotton industry.

The statutes which prescribe the steps a foreign corporation must follow in order to have the right to transact business within Mississippi are typical[8] with the exception that in Mississippi, as in only a very few other States, a corporation must have received its certificate of authority prior to the time a cause of action arises in order to maintain suit on that cause of action. There are 19 cotton producing states in the United States. Allenberg buys cotton in seven of them, and other member firms of the American Cotton Shippers Association purchase cotton in as many as

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8 The procedures for qualifying to do business in Mississippi are found in Sections 5309-221 through 5309-317 of the Mississippi Code 1942 Annotated. In order to procure a certificate of authority, a corporation must first submit an application to the Secretary of State, setting forth, among other things: a statement of the number of authorized shares itemized by class and par value; the number of issued shares by class and par value; a statement of the amount of the stated capital of the corporation; an estimate of the value of all property owned by the corporation and an estimate of the value of all property of the corporation within Mississippi; an estimate of the gross business to be conducted by the corporation for the year and an estimate of the business to be transacted within Mississippi; "such additional information as may be necessary or appropriate in order to enable the Secretary of State to determine whether such corporation is entitled to a certificate of authority to transact business in this state and to determine and assess the fees payable as in this Act prescribed". The fee for issuance of the certificate of authority is $25.00 for the first $5,000.00 of capital stock and $2.00 per $1,000.00 additional above $5,000.00, not to exceed $500.00. Additionally, in order to maintain its qualification, a foreign corporation must file annually with the Secretary of State a report of: the character of the business conducted by the corporation within Mississippi; the names and addresses of the directors and officers of the corporation; the number of authorized shares; the number of issued shares and the amount of stated capital of the corporation.

14 States in one given year. It can be readily seen that to require a merchant to achieve and maintain qualification in a dozen or more States in which its only activities consist of buying commodities to be shipped in interstate commerce would constitute a substantial and possibly prohibitive burden on the interstate marketing of cotton.

It is a well settled principle of law that a State cannot impose a direct burden on interstate commerce. *Gibbons v. Ogden.*[9]

It is equally well settled that to condition the right of a foreign corporation to obtain judicial relief in a State's courts upon such corporation's first obtaining a "certificate of authority" to do business within the State, constitutes, in the case of those corporations engaged in interstate business, a regulation of and direct burden upon interstate commerce. *International Text Book Co. v. Pigg.*[10] The Mississippi Legislature recognized this proposition and, in enacting Section 106 of Chapter 235 of the Public Statutes of Mississippi, inserted the following provision:

> . . . a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities:
>
> * * *
>
> (e) Transacting any business in interstate commerce.

It is insisted that the Mississippi Supreme Court, in holding that as a matter of law, Allenberg was not engaged in interstate commerce, committed error and in so doing,

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9 **Gibbons v. Ogden**, 9 Wheat. 1, 6 L. Ed. 23.

10 **International Text Book Company v. Pigg**, 217 U.S. 91, 54 L. Ed. 678.

substantially deprived Allenberg of its constitutional right to prosecute its interstate business unfettered by State regulation. This decision is not only against the tide of law which has broadened rather than restricted the concept of interstate commerce, but is inconsistent with even the older cases of the court.

The United States Supreme Court, in *Dahnke-Walker Milling Co. v. Bondurant*,[11] a case factually similar to the one at bar, held:

> . . . when goods are purchased in one state for transportation to another, the purchase is interstate commerce, quite as much as is the transportation.[12]

In this case, Dahnke-Walker Milling Company, a Tennessee corporation, contracted to purchase wheat from a farmer in Kentucky. The contract of sale was made in Hickman, Kentucky, and called for payment upon delivery of the wheat on board a common carrier there. It was buyer's customary practice to purchase Kentucky commodities in this fashion for shipment to its mill in Tennessee, the buyer having, in fact, made several previous purchases from this particular farmer. When the market price rose above the contract price, the farmer sold his wheat elsewhere, and the buyer brought suit. Dahnke-Walker had not, prior to entering the contract, qualified to do business in Kentucky.

The buyer's suit in the Kentucky court was dismissed on the basis that, as in the instant case, the activity involved intrastate commerce for which corporate qualification was required, rather than interstate commerce.

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11 **Dahnke-Walker Milling Company v. Bondurant**, 257 U.S. 282, 66 L. Ed. 239.

12 **Dahnke-Walker v. Bondurant**, supra at P. 290.

On appeal, the United States Supreme Court reversed. In reaching its decision, the Court stated:

> The State Court stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars [of a common carrier], and that the plaintiff in continuance of its prior practice was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce . . . .
>
> For these reasons, we are of opinion that the transaction was a part of interstate commerce in which the plaintiff could lawfully engage without permission of the State of Kentucky and that the Statute in question which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."[13]

It is contended that the Mississippi Supreme Court is guilty of the same erroneous reasoning which misled the Kentucky court in *Dahnke-Walker* in stating that:

> The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.[14]

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13 Dahnke-Walker, Supra at P. 292.

14 Allenberg Cotton Company v. Pittman, 276 So. 2d 678.

In the instant case, the sole motivation for Allenberg's purchase of cotton in Mississippi was to ship it in interstate commerce to the mills with whom it had contracted to deliver cotton. The Allenberg contracts called for the farmer to deliver the cotton to a warehouse where it was compressed for transshipment to mills in other States. The proposed delivery of cotton to the warehouse in the case at bar is analogous to delivery of wheat in *Dahnke-Walker* to the common carrier; the warehouse was not to be the final resting point for Mr. Pittman's cotton. The transaction was not thereby stripped of its otherwise interstate character.

Shafer v. Farmers Grain Co., 268 U.S. 189, 69 L. Ed. 909, is a case involving a similar question. In that case, North Dakota had passed a statute which undertook to regulate the marketing of wheat within the State through licensing, bonding and general supervision of those buying wheat within the State. The plaintiffs operated grain elevators within North Dakota at which they bought wheat for shipment to markets in other States. Plaintiffs' grain elevators served as facilities both for receiving grain from the wagons of the farmers and for subsequent loading of the wheat onto railroad cars after accumulation of carload lots. Plaintiffs challenged the constitutionality of the Act. The United States Supreme Court agreed with plaintiffs' contention, holding the Act a direct interference with and burden upon interstate commerce.

> Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping.[15]

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15 Shafer v. Farmers Grain Company, supra, citing Lemke v. Farmers Grain Company, 258 U.S. 50, 66 L. Ed. 458.

It is submitted that the nature of the purchase transactions held to be interstate commerce in *Shafer* are indistinguishable from the nature of the purchases in the case at bar. In *Shafer*, wheat was bought and then loaded into grain elevators to await subsequent shipment by railroad car outside the State. In the instant case, the contract called for the cotton to be delivered to a warehouse to await subsequent shipment outside the State. It is manifest that the decision of the Supreme Court of Mississippi is inconsistent with *Shafer*.

Another decision in which a similar question was before the United States Supreme Court was *Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276, 6 L. Ed. 2d 288. This case involved a foreign corporation conducting both interstate and intrastate activity in New Jersey. Lilly & Company sold its products to wholesalers in New Jersey. It maintained a local office in New Jersey, in which it employed a full time secretary and a staff of 18 detailmen, whose job was to visit New Jersey pharmacists, physicians, and hospitals in order to acquaint them with Lilly products with the hopeful result of increasing the volume of business handled by Lilly's customers, the New Jersey wholesalers. The detailmen also assisted retailers in advertising and promoting Lilly & Co. products.

The United States Supreme Court held that the above activity amounted to a "domestic business—inducing one local merchant to buy a particular class of goods from another." The Court went on to state that:

> Here, Lilly is suing upon a contract *entirely separable* from any particular interstate sale and the power of the State is consequently not limited by cases involving such contracts. [Emphasis added.][16]

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16 **Lilly and Company v. Sav-On-Drugs**, 366 U.S. 276 at 282-283.

The facts in Allenberg are those of *Shafer*, not those of *Lilly*. Allenberg maintained no local office in Mississippi; it had no sales force; its only contact was a local Mississippi buyer who worked on a commission basis for soliciting sales of cotton. The entire offer-acceptance procedure of establishing a contract for the sale and purchase of cotton to be grown in Mississippi was handled through interstate mails and telephone conversations. The local Mississippi buyer solicited offers from farmers in the area. He conveyed such offers to Allenberg in Memphis by interstate telephone conversations. Allenberg either accepted or rejected such offers in Memphis. If they accepted, they prepared and signed a contract and forwarded it to the Mississippi buyer who saw to it that the farmer executed this contract. The actual contract for the sale and purchase of cotton came into existence in Memphis if Allenberg accepted the offer conveyed. The signing of the written contract was only evidence of the oral contract[17] which had been negotiated in interstate commerce. However, the question is not whether the contract was made in Mississippi, but whether the business conducted thereby was interstate in nature. Certainly it was. The entire motivation for purchasing Mr. Pittman's cotton was to deliver the same cotton to textile mills outside the State to meet Allenberg's previous commitments.

In *Shafer*, it was estimated that 90 per cent of the wheat bought by plaintiffs was shipped into interstate commerce; in the instant case, as pointed out in Appellants' Brief, 100 per cent of the cotton purchased by Allenberg in Mississippi during the 1971 crop year was shipped outside the

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17 17 C.J.S. §49 p. 701, citing: **Dohrman v. Sullivan**, 220 S.W. 2d 973; **Murphy v. Chichetto**, 79 N.E. 2d 898; **Rosenfield v. U.S. Trust**, 195 N.E. 323.

State. In fact, there are no textile mills of any significant size located in the State of Mississippi.[18]

CONCLUSION

The Mississippi Supreme Court decision conflicts with the traditional interpretation of interstate commerce, and its effect is to impair the free flow of cotton in interstate commerce. That Court considered only the contract and, finding the contract performable solely in Mississippi, characterized the transaction as intrastate. So, too, in *Dahnke-Walker* and *Shafer*, were the contracts performable. But this is a very narrow view of the events involved in this transaction.

Certainly a State reserves the right to govern intrastate business and may burden foreign corporations with taxes, restrictions and even the punitive measure of impairment of contract. But, this restrictive claim of authority should be limited and construed most strictly against the State imposing such burdens. The cotton industry, like many other industries engaged in the interstate sale of goods, needs the protection of the Federal system and the traditional broad construction of the interstate commerce exclusion. For this reason, the instant case has a significance far beyond the parties involved and needs a judicial clarification of the boundaries of interstate commerce in favor of the free flow of goods.

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[18] USDA Supplement No. 4, 1972, to Bulletin No. 417, **Statistics on Cotton and Related Data, 1930-1967**, pp. 58 and 77.

For the above-stated reasons, as well as those developed by appellant, the decision of the Supreme Court of the State of Mississippi should be reversed.

Respectfully submitted,

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